75-268

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975

No. 268

HYMAN RADZANOWER,

Petitioner,

vs.

THE FIRST NATIONAL BANK OF BOSTON,

Respondent,

and

TOUCHE, ROSS & CO., TELEPROMPTER CORPORATION, JACK K. COOKE, RAYMOND P. SHAFER, W. J. BRESNAN, H. J. SCHAFLY, LEONARD TOW, R. C. TODD, JR., B. P. SIMON, J. B. GREEN, L. H. READ, R. G. WILSON, H. E. FLAHERTY, B. D. FISCHMAN, BERLE ADAMS, MARVIN CARTON, R. F. LEWIS, P. L. LOWE, CHARLES LUCKMAN, M. B. MITCHELL, A. E. PUCKETT, J. H. RICHARDSON, M. E. LIVINGSTON, and JACK WRATHER,

Defendants.

BRIEF IN OPPOSITION TO CERTIORARI

SAMUEL E. GATES
RICHARD I. JANVEY
299 Park Avenue
New York, New York 10017
Attorneys for Respondent

Of Counsel:

DEBEVOISE, PLIMPTON, LYONS
& GATES

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Defendants.

BRIEF IN OPPOSITION TO CERTIORARI

Question Presented

The only question that can properly be presented by the petition for certiorari in this case is whether The First National Bank of Boston (the "Bank"), which is established in Boston, Massachusetts, waived the mandatory venue provisions of section 94 of the National Bank Act (12 U.S.C. §94) by qualifying to engage in limited fiduciary activities in New York State.

Proceedings Below

The Bank moved, pursuant to Rule 12(2) and (3), Fed. R. Civ. P., in the United States District Court for the Southern District of New York (the "District Court") for an order dismissing this action as to it on the ground of improper venue. On October 21, 1974, Judge Lloyd F. MacMahon of that court filed an unreported Endorsement granting the Bank's motion, and judgment was entered thereon. An appeal from that judgment was taken to the United States Court of Appeals for the Second Circuit (the "Court of Appeals"), and at the conclusion of oral argument a panel of that court (Circuit Judges William H. Mulligan and Murray I. Gurfein and District Judge Milton Pollack, sitting by designation) affirmed in open court the District Court's judgment. No petition for rehearing, pursuant to Rule 40, Fed. R. App. P., was sought.

The Petition Should Be Denied

The decision below is clearly correct and in accord with the decisions of all other Circuit Courts of Appeal which have construed the question of waiver of the provisions of section 94 of the National Bank Act.

The petition seeks to raise for the first time the issue of whether the venue provisions of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §78aa (1970), should prevail over the special venue provisions of the National Bank Act, 12 U.S.C. §94 (1970). This issue was never presented for review to the District Court or to

the Court of Appeals. Accordingly, the record in this case does not present an opportunity to review such conflict as may exist in decisions between the Second and Ninth Circuits and the Third Circuit with respect to the prevalence of the special venue provisions of the National Bank Act.

Statement of the Case

The Bank is a national banking association organized and existing under the laws of the United States. *See* 12 U.S.C. §§12-78 (1970). Section 94 of the National Bank Act requires that an action against the Bank be brought in the District of the United States in which the Bank is established. Petitioner in his complaint asserted a claim for relief purportedly arising under the Exchange Act, which contains liberal venue provisions, 15 U.S.C. §78aa (1970). Petitioner did not dispute either in the District Court or in the Court of Appeals that venue in this action with respect to the Bank is determined by section 94 of the National Bank Act.

The Bank is established in the City of Boston, Commonwealth of Massachusetts. On January 15, 1971 the Bank, as a foreign bank, qualified pursuant to section 131(3) of the New York Banking Law to perform certain limited fiduciary activities in New York State with respect to the administration of trusts and estates. As required by section 131(3), the Bank filed with the Superintendent of Banks for the State of New York a Power of Attorney which designated the Superintendent of Banks as the Bank's agent in New York upon whom process could be served in any action affecting or relating to an estate, trust

or fund held by the Bank or represented by it. It is expressly provided by section 131(3) that this designation permitted the Bank to engage only in certain limited and specified fiduciary activities.

I.

The only issue presented by petitioner in the District Court or in the Court of Appeals was whether the Bank waived the venue provisions of section 94 of the National Bank Act.

Both in the District Court and in the Court of Appeals, petitioner's sole and extremely formalistic claim was that the Bank expressly waived its right to be sued only in the District of Massachusetts because the Power of Attorney filed by the Bank did not duplicate precisely the language contained in section 131(3) of the New York Banking Law. The Court of Appeals affirmed the District Court's determination that the Bank did not voluntarily and knowingly relinquish its right to be sued only in the District of Massachusetts except as to those activities which are within the scope of section 131(3). No other issue was ever raised in or decided by the District Court or the Court of Appeals.

Now, for the first time, petitioner seeks to smuggle an additional issue into the case and attempts to raise the question of whether the mandatory venue requirement of section 94 of the National Bank Act has been superseded by the venue provisions of the Exchange Act. Petitioner raises this new question by asking this Court to resolve a conflict in decisions between the Second and Ninth Circuits

and the Third Circuit, with respect to the prevalence of the venue provisions of the National Bank Act over those of the Exchange Act.

Because this Court has construed the venue provision of the National Bank Act as mandatory, *Michigan Nat'l Bank* v. *Robertson*, 372 U.S. 591 (1963); *Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555, 562 (1963), the United States Court of Appeals for the Second Circuit has squarely held that the venue provisions of the National Bank Act prevail over the venue provisions of the Exchange Act. *Klein* v. *Bower*, 421 F.2d 338, 342 (2d Cir. 1970); *Bruns, Nordeman & Co.* v. *American Nat'l Bank & Trust Co.*, 394 F.2d 300 (2d Cir.), *cert. denied*, 393 U.S. 855 (1968).

The view taken by the Second Circuit has also been adopted by the Ninth Circuit. *United States National Bank* v. *Hill*, 434 F.2d 1019 (9th Cir. 1970). See also *The First National Bank of Boston* v. *United States District Court*, 468 F.2d 180 (9th Cir. 1972). (Leonard P. Moore, J., discussing Second Circuit cases).

In *Ronson Corporation* v. *Liquifin Aktiengesellschaft*, 483 F.2d 852 (3d Cir. 1973), the Court of Appeals for the Third Circuit reached the conclusion that the venue provisions of the Exchange Act prevail over the special venue requirement of the National Bank Act. However, that court recognized that its decision was contrary to the overwhelming weight of appellate authority.

At no time did petitioner raise or ask the Court of Appeals or the District Court to consider the issue with

respect to which the Second and Ninth Circuits and the Third Circuit have reached conflicting decisions—namely, whether the venue provisions of section 94 of the National Bank Act are superseded by those of the Exchange Act. The Court of Appeals' decision as to which review is now sought did not involve that issue and is not in conflict with any decision of another Court of Appeals on the same matter of federal law. Neither in his briefs filed in the District Court in opposition to the Bank's motion to dismiss (a copy of which is set forth in the Appendix hereto, 1a-7a) nor in his brief in the Court of Appeals (a copy of which also is set forth in the Appendix hereto, 8a-20a) did petitioner ever discuss this issue.

In fact, petitioner never cited the *Ronson* case in any of his briefs in the District Court or the Court of Appeals. The only time petitioner ever referred to the *Ronson* case, decided on August 15, 1973, was on May 23, 1975 at oral argument before the Court of Appeals. After petitioner's counsel called the court's attention to the *Ronson* case, Judge Mulligan specifically asked whether in light of *Ronson* petitioner was asking the Court of Appeals to reconsider and overrule its decision in the *Bruns, Nordeman* case, *supra*. Petitioner's counsel stated expressly that he was declining so to do. Rather, he indicated that he was referring to *Ronson* only in support of the proposition that the venue provisions of the National Bank Act should be narrowly interpreted and that the Court should find, as a factual matter, that the Bank had waived the venue provisions of section 94.*

* The argument before the Court of Appeals was tape-recorded. However, copies of transcripts of arguments before the Court of Appeals for the Second Circuit are not available to the parties.

Having failed to raise the issue of the prevalence of the venue provisions of the National Bank Act in the District Court or the Court of Appeals, petitioner cannot now seek review of such issue. *Neely* v. *Eby Construction Co.*, 386 U.S. 317, 330 (1967); *Lawn* v. *United States*, 355 U.S. 339, 362 n. 16 (1958); *Husty* v. *United States*, 382 U.S. 694, 701-702 (1931). As stated in *Duignan* v. *United States*, 274 U.S. 195, 200 (1927), "This Court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed [citations omitted]". Clearly, this is not an exceptional case.

II.

The conflict in decisions between the Second and Ninth Circuits and the Third Circuit with respect to the venue provisions of the National Bank Act does not warrant review by this Court at this time.

Even if petitioner had raised below the issue of whether the venue provisions of the Exchange Act prevail over those of section 94 of the National Bank Act and the Second Circuit had adhered to its earlier decisions, review should still be denied. The *Bruns, Nordeman* case and other Second and Ninth Circuit cases were correctly decided, and it is submitted that the decision and reasoning of the *Ronson* case are patently erroneous.

The *Bruns, Nordeman* case properly recognized that section 94 of the National Bank Act is mandatory in application and requires that all transitory actions be brought

in the district in which a national bank is established or located. *Mercantile Nat'l Bank* v. *Langdeau, supra; Michigan Nat'l Bank* v. *Robertson, supra.* This Court has held on numerous occasions that in the absence of express legislative intent to the contrary, statutes dealing with a narrow and specific problem will be held to prevail over more general provisions of another statute. *E.g. Kepner* v. *United States,* 195 U.S. 100, 125 (1904); *Rodgers* v. *United States,* 185 U.S. 83, 87-88 (1902). This Court has specifically held that where particular venue provisions have been enacted by Congress, the broader language of a general venue statute does not supersede the specific legislation even though it may be literally applicable. *Stonite Products Co.* v. *Melvin Lloyd Co.,* 315 U.S. 561 (1942); *Fourco Glass Co.* v. *Transmirra Products Corp.,* 353 U.S. 222 (1957).

Moreover, because no decision dealing with the issue of the prevalence of the National Bank Act's venue provisions was made by the Court of Appeals in the instant case, this Court does not have the benefit here of a record containing any opinion of the Second Circuit's reexamining and reconsidering its earlier decisions or the decision in *Ronson.* The conflict is not clearly manifested and the extent to which the Circuits are in conflict cannot be properly defined from this record.

Conclusion

The petition should be denied.

Respectfully submitted,

SAMUEL E. GATES
RICHARD I. JANVEY
299 Park Avenue
New York, New York 10017
Attorneys for Respondent

Of Counsel:

DEBEVOISE, PLIMPTON, LYONS
& GATES

APPENDIX

United States District Court
Southern District of New York

74 Civ. 3025 (JMC)

HYMAN RADZANOWER,

Plaintiff,

against

TOUCHE, ROSS & Co., *et al.*,

Defendants.

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION BY DEFENDANT FIRST NATIONAL BANK OF BOSTON TO DISMISS THE COMPLAINT AS TO IT

IRA JAY SANDS
701 Seventh Avenue
New York, New York 10036

Of Counsel:

IRA JAY SANDS
SAMUEL GOTTLIEB
STANLEY YAKER

United States District Court

Southern District of New York

---

74 Civ. 3025 (JMC)

HYMAN RADZANOWER,

Plaintiff,

against

TOUCHE, ROSS & Co., *et al.*,

Defendants.

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION BY DEFENDANT FIRST NATIONAL BANK OF BOSTON TO DISMISS THE COMPLAINT AS TO IT

Facts

Plaintiff has included the First National Bank of Boston as a party defendant upon the ground that the Bank conducted business in the State of New York in its involvement with defendant Teleprompter Corporation, and other defendants, and that the Bank aided and abetted the other defendants in the violations of the Securities Acts alleged, including a violation of the common law of the State of New York and the Act of the State of New York, commonly known as the "Martin Act" which controls securities dealings within the State of New York.

The Bank moves for dismissal as to it, claiming that the National Bank Act, §94, requires a plaintiff to only sue the Bank in the District of Massachusetts where the Bank was founded.

On the other hand, plaintiff has located and introduces as an exhibit to plaintiff's affidavit in opposition herein, a letter dated January 15, 1971 to the Legal Division of the State of New York Banking Department, with a copy to the New York State Superintendent of Banks, enclosing various instruments in connection with the designation of the Superintendent of Banks of the State of New York as agent for service of process upon the Bank within New York State. Also attached as an Exhibit "B" is an official document of such designation, both of which were voluntarily prepared and voluntarily supplied by this Bank in its effort to do business within this State. The letter of January 15, 1971 is Exhibit "A".

ARGUMENT

Since the Bank voluntarily desired to do business in New York and thus voluntarily designated the Superintendent of Banks as agent for service of process, the Bank is bound by its previous actions.

No one forced the Bank to seek to do business in New York in 1971. This was a voluntary act. Section 131 of the New York Banking Law requires a foreign bank to designate the Superintendent of Banks as agent for service of process, before that foreign bank conducts business in New York.

The Banking Law goes even further than its counterpart in the Motor Vehicle Law wherein a foreign driver automatically designated the Secretary of State of New York as agent for service of process upon him in the event of a vehicle incident. Here, the Bank voluntarily executed and filed documents designating the Superintendent of Banks as agent for service of process in order to take advantage of permission granted by our State law to do business in this State.

If it were not for this submission to the jurisdiction of our Superintendent of Banks, the First National Bank of Boston would not be permitted to conduct business within the State of New York. The Bank cannot be heard to say that this designation of the Superintendent was an unfair infringement upon its rights and the Bank took full advantage of its right to now do business in the State of New York as if it were a New York corporation.

Those Banks which do *not* permit themselves to be qualified within New York, and do *not* designate the Superintendent *cannot* do business within the State. They are protected in service of process by the National Bank Act, §94, even though §94 has been looked upon by our Courts with *disfavor*. But our facts go further.

Chief Judge Friendly said in *Bruns, Nordeman* v. *American National Bank & Trust Co.*, 394 F.2d 300, 301 (2d Cir. 1968), that our Circuit would *reluctantly* follow those Courts which found that the National Bank Act of 1864 contained venue provisions which prevailed over those of the Federal Securities Acts.

> "We conclude with regret that the rulings upholding the claim of prevalence of the 1864 statute are right."

The New York Banking Law §200-b, paragraph 1, states in part:

> "An action or special proceeding against a foreign banking corporation may be maintained by a resident of this State for any cause of action."

Certainly, this statute was not designed to circumvent the National Bank Act, but to refer only to those foreign banking corporations which had become qualified to do business within New York.

Furthermore, §200 of the New York Banking Law refers to foreign banking corporations doing other bank related business in New York and to the requirement that such foreign banking corporations must file with the Superintendent of Banks a designation for service of process.

In *Milion* v. *National Bank of Greece*, 166 Misc. 190, 2 N.Y.S. 2d 155 (1938), affd. 253 App. Div. 650 (1939), the Supreme Court made it clear that the purpose of the requirement of the New York Banking Law to have a foreign bank desiring to do business in this State, designate the Superintendent of Banks, is to require those foreign banks to submit controversies growing out of that New York business to New York courts, so that New York residents having causes of action against them will *not* be required to seek out the Bank's distant home for enforcement of their claims.

In *Varga* v. *Credit Suisse*, 2 App.Div. 2d 596 (1956), 157 N.Y.S. 2d 391, the Court held that the purpose of the requirement of the New York Banking Law that foreign banking corporations doing business in the State appoint

the Superintendent as agent for service of process, is not to limit, but rather to expand and amplify opportunities for plaintiffs to effect service. Also to facilitate acquisition of jurisdiction *in personam* over defendant foreign banks in those cases where adequate methods of obtaining redress for a wrong might be not otherwise afforded, if the plaintiff had to go to the distant home of that foreign bank, despite a transaction within New York.

In *Milion, supra,* the Court went further and said that where a foreign bank regularly transacts business in New York through an agent or correspondent, the bank is not beyond the New York jurisdiction, where the correspondent designated the Superintendent or Secretary of State as agent for service of process.

The statute and cases make no distinction between those banks which are foreign national banks and those which are foreign state banks. Where they voluntarily qualify and voluntarily designate the Superintendent as agent for service of process, they have come under the jurisdiction of our Courts and are amenable to our service.

Examination of Exhibit "A" or Exhibit "B" fails to disclose any reservation of rights by The First National Bank of Boston or any limitation upon the type of process which may be served on it. In fact, Exhibit "B" is broad! It uses the following words:

> ". . . upon whom all lawful processes in any action or proceedings against this bank in New York may be served in like manner and with the same effect as if this bank existed therein."

This refers to *all* lawful process. It refers to *any action* or proceeding. It is limited of course, as the statute does, to New York situations, precisely as we have in the case at bar.

Conclusion

The First National Bank of Boston has voluntarily submitted to service of process in this State and designated the Superintendent of Banks as its agent for service. Long-arm rules of this State permit service to be made upon the Bank by long-arm directly at its Boston office, as an alternative to serving its agent for process in this State. Either could have been done. Either would have been effective to obtain jurisdiction over the Bank in this action in this Court.

For the above reasons, the motion to dismiss with respect to the Bank should be denied.

Respectfully Submitted,

IRA JAY SANDS

By: /s/ IRA SANDS

and

SAMUEL GOTTLIEB
GAINSBURG, GOTTLIEB, LEVITAN & COLE
Attorneys for Plaintiff
Office & Post Office Address
701 Seventh Avenue
New York, New York 10036

Of Counsel:

IRA JAY SANDS
SAMUEL GOTTLIEB
STANLEY YAKER

To be argued by
SAMUEL GOTTLIEB, Esq.

United States Court of Appeals
For the Second Circuit

Docket No. 74-3025

HYMAN RADZANOWER,
Plaintiff-Appellant,
against

FIRST NATIONAL BANK OF BOSTON,
Defendant-Appellee,
against

TOUCHE, ROSS & CO., TELEPROMPTER CORPORATION, JACK K. COOKE, RAYMOND P. SHAFER, W. J. BRESNAN, H. J. SCHAFLY, LEONARD TOW, R. C. TODD, JR., B. P. SIMON, J. B. GREEN, L. H. READ, R. G. WILSON, H. E. FLAHERTY, B. D. FISCHMAN, BERLE ADAMS, MARVIN CARTON, R. F. LEWIS, P. L. LOWE, CHARLES LUCKMAN, M. B. MITCHELL, A. E. PUCKETT, J. H. RICHARDSON, M. E. LIVINGSTON and JACK WRATHER,

Defendants.

BRIEF FOR PLAINTIFF-APPELLANT

IRA JAY SANDS
Attorney for Plaintiff-Appellant
701 Seventh Avenue
New York, New York 10036
(212) 265-3500

and

GAINSBURG, GOTTLIEB, LEVITAN & COLE
Co-Counsel for Plaintiff-Appellant
122 East 42nd Street
New York, New York 10017
(212) 697-3440

SAMUEL GOTTLIEB
IRA JAY SANDS
ALAN C. KRIEGER
Of Counsel

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BRIEF FOR PLAINTIFF-APPELLANT

Statement

Plaintiff appeals from an order entered in the United States District Court for the Southern District of New York, of Hon. Lloyd F. MacMahon, United States District Judge, dated October 21, 1974, granting the motion of defendant-appellee, First National Bank of Boston, dismissing this action as to it on the ground of improper venue (A-56-7*).

The Issue Presented

Defendant-appellee, First National Bank of Boston (herein Boston Bank) was named as a party defendant in this class action upon the ground that it conducted banking business in the State of New York and was involved with defendant Teleprompter and other defendants in the acts violative of the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), the New York State Statute (Martin Act) and the common law; jurisdiction is based on §27 of the Exchange Act and pendent jurisdiction (A-15-30).

No challenge was presented to the sufficiency of the allegations (A-16-28) upon which liability against the defendants was asserted and upon which recovery was sought. Appellee's motion to dismiss was predicated solely "on the

* These numerical references are to the Joint Appendix. All emphasis supplied, unless otherwise indicated.

ground of improper venue" and was expressly granted on that basis (A-56-57).

The Opinion Below

In granting the motion to dismiss, Judge MacMahon ruled:

> "Absent waiver or consent, a national bank may be sued only in the district in which it is established. 12 U.S.C. Section 94; *Cope* v. *Anderson*, 331 U.S. 461, 467 (1947); *Klein* v. *Bower*, 421 F.2d 338, 342 (2d Cir. 1970); *Bruns, Nordeman & Co.* v. *American Nat'l Bank & Trust Co.*, 394 F.2d 300 (2d Cir.), *cert. denied*, 393 U.S. 855 (1968); *Buffum* v. *Chase Nat. Bank of City of N.Y.*, 192 F. 2d 58 (7th Cir. 1951), *cert. denied*, 342 U.S. 944 (1952). Movant is established in Boston, Massachusetts, within the meaning of 12 U.S.C. Section 94, because its charter specifies Boston as its principal place of business. *Buffum* v. *Chase Nat. Bank of City of N.Y., supra*, 192 F.2d at 60; *Leonardi* v. *Chase Nat. Bank of City of N.Y.*, 81 F. 2d 19, 22 (2d Cir.), *cert. denied*, 298 U.S. 677 (1936); *Southeast Guaranty Trust Co.* v. *Rodman & Renshaw, Inc.*, 358 F. Supp. 1001, 1004 (N.D. Ill. 1973); *General Electric Credit Corp.* v. *James Talcott, Inc.*, 271 F. Supp. 699 (S.D.N.Y. 1966).
>
> Movant's designation of the New York Superintendent of Banks to receive process on its behalf is not a waiver of this venue provision. Although the language of the designation is broad, it specifically evidences an intent to comply with Section 131(c) of the New York Banking Law, which requires such a designation before a foreign bank can operate in a fiduciary capacity in New York. This designation operates as a waiver of the venue provision only in actions involving movant's fiduciary acts in New York, and no such acts are alleged or involved here.
>
> Accordingly, First National Bank of Boston's motion to dismiss this action on the ground of improper venue is granted in all respects." (A-56-7)

The Broad and Unlimited Designation by Appellee Boston Bank of the New York Superintendent of Banks to Receive Process in Its Behalf

> "Know All Men By These Presents that I, T. McLean Griffin am Cashier of the First National Bank of Boston, a national banking association located in the City of Boston, County of Suffolk, Commonwealth of Massachusetts, and organized under the laws of the United States of America. This Bank desires to transact business in the State of New York in conformity with Section 131(3) of the New York State Banking Law. The First National Bank of Boston hereby constitutes and *appoints the Superintendent of Banks, State of New York, and his successors in such office, to be the true and lawful attorney of this Bank in and for the State of New York, upon whom all lawful processes in any action or proceeding against this Bank in New York may be served in like manner and with the same effect as if this Bank existed therein.*
>
> The First National Bank of Boston hereby designates the undersigned, T. McLean Griffin, Cashier, and his successors in office, to be the appropriate officer of the Bank to whom process shall be forwarded by the Superintendent of Banks.
>
> /s/ T. McLean Griffin
>
> T. McLean Griffin, Cashier"
> (A-47)

It is our contention that since as the Court below noted "the language of the designation is broad", the claim of "improper venue" was and is untenable.

POINTS

I.

The New York Superintendent of Banks was broadly designated as the Boston Bank's agent "upon whom all lawful processes in any action or proceeding against this Bank in New York may be served in like manner and with the same effect as if this Bank existed therein."

Venue in this state was therefore proper. It was error to hold that the bank's intent was narrower than that indicated by the unlimited language of the designation it executed.

Although the "hardships sometimes imposed on plaintiffs" as a result thereof have caused §94 of the National Banking Act, as amended (12 U.S.C. §94) "to come under severe criticism",[1] we of course recognize that the "special and properly wide venue provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934" do not overcome the "special and exceedingly narrow venue provisions" of §94 of the National Banking Act (12 U.S.C. §94).[2] However, it is noteworthy that FRIENDLY, J., writing for this unanimous Court said: "[w]e conclude with regret that the rulings upholding the claim of prevalence of the 1864 Statute are right."[3]

1. *Southeast Guar. Tr. Co., Ltd.* v. *Rodman & Renshaw, Inc.*, 358 F. Supp. 1001, 1005; *Klein* v. *Bower*, 421 F. 2d 338, 342, 2 Cir. 1970; *Bruns, Nordeman & Co.* v. *American Nat Bank & Trust Co.*, 394 F. 2d 300, 302-4, 2 Cir. 1968; *Gen. Electric Credit Corp.* v. *James Talcott, Inc.*, 271 F. Supp. 699, 707, S.D.N.Y. 1966.
2. *Bruns, Nordeman & Co., supra.*
3. *Bruns, Nordeman & Co., supra.*

In the foregoing designation (p. 3, *supra*), it is stated: "[t]his Bank desires to transact business in the State of New York in conformity with Section 131(3) of the New York State Banking Law." The bank's Associate Counsel and Assistant Vice President in the moving affidavit below asserts "that solely in connection with its qualification pursuant to Section 131(3) of the Banking Law of New York to act in a fiduciary capacity in the surrogate's courts of the state and in other fiduciary capacities in the state, the Bank filed an instrument on January 15, 1971 appointing the Superintendent of Banks of the State of New York as its attorney upon whom all process could be served, in any action affecting or relating to an estate, trust or fund held or represented by it."

The Banking Law of New York does provide (Art. 3, §131, subd. 3), that a non-New York bank, as therein specified,

> "may act as trustee, guardian, executor, administrator, or in any other fiduciary capacity under any last will and testament or codicil thereto or other testamentary writing or under any deed of trust inter vivos or other written instrument establishing a trust, or by the appointment of any court of said state, may act in this state in any such fiduciary capacity, provided similar domestic corporations which have the power under the law of this state to act herein in any such fiduciary capacity, are permitted to act in like fiduciary capacity in the state where such foreign corporation has its domicile, provided that if such foreign corporation proposes to act in any fiduciary capacity in this state and to do so is required to file its qualification in the surrogate's court of this state, it shall file in the office

of the clerk of the surrogate's court of the county in which application for such appointment is pending

(a) a duly executed instrument in writing, by its terms of indefinite duration and irrevocable, appointing such clerk and his successors its true and lawful attorney, *upon whom all process in any action or proceeding against such fiduciary, affecting or relating to the estate, trust or fund represented or held by such fiduciary or the acts or defaults of such corporation in reference to such estate, trust or fund* may be served with the same force and effect as if it were a domestic corporation and had been lawfully served with process within the state, and (b) a copy of its charter certified by its secretary under its corporate seal, together with the post office address of its principal office;"

and

"provided further that if such foreign corporation proposes to act in any other fiduciary capacity in the state, it shall file in the office of the superintendent (a) a duly executed instrument in writing, by its terms of indefinite duration and irrevocable, appointing the superintendent and his successors its true and lawful attorney, *upon whom all process in any action or proceeding against such fiduciary affecting or relating to the estate, trust or fund held or represented by such fiduciary or the acts or defaults of such corporation in reference to such estate, trust or fund* may be served with the same force and effect as if it were a domestic corporation and had been lawfully served with process within the state, (b) a written certificate of designation, which may be changed from time to time thereafter by the filing of a new certificate of designation, specifying the name and address of the officer, agent or other person to whom such process shall be forwarded by the superintendent, and (c) a copy of its charter certified by its secretary under its corporate seal, together with the post office address of its principal office."

The designation executed by the bank (p. 3, *supra*) was of course *pro tanto* a waiver of its right to be sued only in the district in which it is established (12 U.S.C. §94). Had it been phrased in the limited terminology of the foregoing §131, subd. 3 of the New York Banking Law heretofore quoted and underscored, [italicized] the waiver would have unquestionably been limited to the service of process on the New York Superintendent of Banks in any action or proceeding against the bank as "fiduciary affecting or relating to the estate, trust or fund held or represented by such fiduciary or the acts or defaults of such fiduciary in relation to such estate, trust or fund" (p. 6, *supra*).

But the bank did not do so. The designation was in the unlimited and broad terminology specified in Art. 5 of the New York Banking Law treating with "foreign banking corporations and national banks", namely §200 thereof, which requires a foreign banking corporation other than a bank organized under the laws of the United States as a precondition to transacting banking business in this state to file a designation in the broad language of the instrument here executed.

The bank through its counsel who prepared the instrument claims that it did not intend to file a designation in the broad form which it was not required to do (A-32; p. 5, *supra*). However, it failed to do what the Chase National

Bank did in *Buffum* v. *Chase Nat. Bank of City of New York,* 192 F. 2d 58, 7 Cir. 1951, wherein it is pointed out that:

> "In this case there is no question but that defendant applied for and obtained leave to transact business in the state of Illinois for the limited purpose of 'acceptance and execution of trusts and receipt of deposits of trust funds in Illinois.' Though its original agent for service was authorized to accept service 'in all suits in Illinois,' *when he was replaced with another, the resolution creating the successor's authority provided that he should be the registered agent in matters involving the limited purpose for which defendant was qualified to do business in Illinois.* So our question in this respect is, did defendant, *by qualifying for the limited purpose of doing trust business in Illinois,* intend to waive its right to be sued in a transaction which on its face does not purport to grow out of such trust business?" (p. 61)

Defendant bank in *Buffum* "moved to dismiss upon the ground, amongst others, that under Title 12 U.S.C.A. §94, an action against defendant may be brought only in the Southern District of New York where it is located;" and that the Chase Bank "in complying with the foreign corporation laws of Illinois and consenting that it might be sued there" had "*limited its consent to transaction of business in Illinois only 'in connection with its acceptance and execution of trusts and to receive deposits of trust funds in Illinois.'*" (*Buffum, supra,* p. 59).

This defendant Boston Bank in effect asked the Court below to read into its broad designation the limited lan-

guage that was ultimately specifically used in *Buffum,* asserting that that was its intent. The admittedly broad language employed, we submit, does not manifest any such intent. In judicially determining a litigant's intent, as the New York Court of Appeals has consistently held, "we 'concern ourselves with what the parties intended, *but only to the extent that they evidenced what they intended by what they wrote.*'" And this notwithstanding that "the real intent of the parties" may have been otherwise (*Rodolitz* v. *Neptune Paper Prods.,* 22 NY 2d 383, 386-7, 1968; *Raleigh Assoc.* v. *Henry,* 302 N.Y. 467, 473).

The acts, activities and transactions in which the defendant bank allegedly was involved, participated in, aided and abetted, as alleged in the complaint, refer to matters in New York (A-16-28) and as was stated in the opposing affidavit below "[p]laintiff's position is that the designation by this defendant bank covers suits arising out of its business *conducted in New York.*" (A-52)

In view of the critical reluctance with which the venue limitation specified in 12 U.S.C. §94 has been applied, as heretofore indicated, we respectfully submit the learned Court below was not constrained to read into the broad language of the designation, the limiting language that did

not appear therein, notwithstanding that such in fact was the actual intent; especially since this record does not establish that in the period following the execution of the designation (January 15, 1971; A-47), defendant Boston Bank did not conduct any other banking business in the State of New York, except as a fiduciary in reference to an estate, trust or fund, etc., as specified in the Banking Law of New York, Article 3, §131, subd. 3. Surely, at least a hearing was warranted if any issue is presented in that regard. (A-23-25; A-32; A-52)

II.

The order dismissing the complaint on the ground of improper venue should be reversed.

Respectfully submitted,

IRA JAY SANDS
Attorney for Plaintiff-Appellant
701 Seventh Avenue
New York, New York 10036
(212) 265-3500

and

GAINSBURG, GOTTLIEB, LEVITAN & COLE
Co-Counsel for Plaintiff-Appellant
122 East 42nd Street
New York, New York 10017
(212) 697-3440

SAMUEL GOTTLIEB
IRA JAY SANDS
ALAN C. KRIEGER
Of Counsel